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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Truth-in-Billing	)	**CC Docket No. 98-170**
and	)	
Billing Format	)	

COMMENTS

OF

GLOBAL TELECOMPETITION CONSULTANTS, INC.

("GTC")

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INITIAL COMMENTS OF
GLOBAL TELECOMPETITION CONSULTANTS, INC. ("GTC")

INTRODUCTION

Global Telecompetition Consultants, Inc. ("GTC") hereby submits its comments in response to the Federal Communications Commission's ("FCC's" or "Commission's") Notice of Proposed Rulemaking ("NPRM") in the above-captioned docket.

GTC is a telecommunications consulting firm managed by individuals with a variety of business, management, operational, networking and legal/regulatory expertise. GTC's collective experience includes competitive interexchange carriers, competitive local exchange service providers, telecom operations and pricing, local and long-haul network design and engineering, domestic and international services, financing, staffing/training, price/cost analysis, marketing programs, Internet/e-commerce, Y2K issues, and the legal and regulatory issues which surround and affect all of these telecommunications areas. GTC has over 50 years of combined experience, the knowledge and talent to support a wide variety of telecommunications undertakings and, with its innovative and unique "Associates Program," can provide the expertise needed to solve problems and enhance the operations of its clients on nearly any existing or emerging telecommunications issue.

GTC is often asked to consult and advise on billing issues. Many of the issues raised in this proceeding are issues which GTC's clients deal with on a regular basis and by which they are affected. Based on GTC management's long history in telecommunications and its current and on-going representation of its clients, GTC submits these comments on behalf of its clients and for other telecommunications providers because of GTC's interest in advancing the competitive environment for all telecommunications providers.

SUMMARY

GTC and its clients support the Commission's goal of ensuring that customers receive thorough, accurate, and understandable bills from their telecommunications carriers. GTC's support recognizes and incorporates the Commission's guidelines as a proper starting point for advancing the principle of fairness in billing: first, bills should be clearly organized and highlight any new charges or changes to consumers' services; second, bills should contain full and non-misleading descriptions of all charges that appear therein and clear identification of the service provider responsible for each charge, and; third, bills should contain clear and conspicuous disclosure of any information that the consumer may need to make inquiries about the charges on the bill.[1] While GTC fully supports these guidelines as stated, GTC's information and its clients' actual experiences do not comport with one of the seemingly fundamental assumptions underlying the Truth-in-Billing NPRM. GTC submits that clarity in billing in a competitive marketplace cannot be achieved absent a clear understanding of certain aspects of specific current billing practices used by local exchange carriers and their billing agents when billing for competitive interexchange carriers ("IXCs"). In addition, these practices must be analyzed in the context of important related issues such as: the lack of true alternatives for billing certain market segments; the tiered contractual structure and aberrations it creates for establishing a balanced and pro-competitive marketplace; and the impact of such factors on small carriers. Longer term, the Commission must seek a broader vision of

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[1] *In the Matter of Truth-in-Billing and Billing Format*, Notice of Proposed Rulemaking ("NPRM"), CC Docket No. 98-170 (rel. Sept. 17, 1998) at ¶ 10.

tomorrow's competitive environment when the distinction between LECs and IXCs will dissipate. For example, many smaller IXCs must rely on LEC billing, directly or indirectly through billing clearinghouses. In GTC's experience simply modifying billing formats is, at best, a temporary fix to a more complex problem. Absent gaining an understanding of the overall billing and collection framework, and establishing a willingness to address the issues raised by that structure, the Commission's and the industry's goal of eliminating the problem of unclear bills and the public confusion created thereby, will fall short of optimal improvement.

I. REGULATING BILL CONTENT IS INADVISABLE

Direct regulation of bill content will embroil the Commission in a no-win contest. GTC submits that content regulation will inevitably lead to assertions of censorship, implicating First Amendment guarantees (discussed more fully below), spawn complaints and litigation, increase operating costs and regulatory burdens beyond reasonable levels, particularly for small carriers, and fail to achieve the ultimate goal of this proceeding. GTC does not dispute, however, that bill content needs to be improved in certain circumstances. Furthermore, experience teaches that there are differences in billing practices resulting from the entities involved in the process that should be recognized and addressed.

The Commission was correct in its recognition that, with the advent of competitive billing enterprises, the need for regulation of billing changed.[2] Further, GTC agrees that the basis on which the Commission took its deregulatory approach in 1986 was perfectly suited to the facts the

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[2] *In the Matter of Detariffing of Billing & Collection Services*, 102 FCC 2d 1150 (1986) ("1986 Detariffing Order").

Commission then had before it. But since then, experience has provided useful information and insights upon which a more refined approach may be crafted.

First, industry experience dictates that the practices of competitive billing enterprises do not affect the issues in the same way that the billing practices of the major incumbent LECs do. The conclusion, therefore, may be fairly drawn that there is less need, most probably no need, for the Commission to expend policy development resources in the area of competitive billing enterprises. This is not to say the Commission should not be or will not be responsive to specific problems in this area brought to its attention through proper procedures. It is to say that expending limited government policy resources on a sometime, infrequent problem, is a waste. GTC agrees with the Commission's own determination that a truly competitive marketplace is a sufficient incentive for direct billing carriers to provide their customers with clear, accurate, and understandable bills. In a competitive marketplace, the failure of a direct billing carrier to meet the needs and desires of its customers with regard to service related practices, including billing, will inevitably lead to the loss of customers. Therefore, independent billing companies should be permitted to exercise their good business judgment concerning billing format and content without regulatory constraints or dictates.

For some very practical reasons, this is not as true in regard to the industry segment that finds or believes that it is captive to the use of incumbent LEC billing. In this area, the same competitive forces do not exist and, therefore, cannot be relied upon to eliminate the problems connected with the billing practices of ILECs and their intermediaries.

II. IT IS FACTUAL ERROR TO BLAME IXCs FOR TROUBLESOME BILLING

GTC submits that a factual inquiry of present day billing will demonstrate: (1) that most billing problems reside in the residential market; (2) that the vast majority of billing in this market is done by ILECs; (3) that IXCs which serve the residential market believe or, based on experience, know that they must rely on ILEC billing to collect their charges; and (4) that regulatory policies which encourage the public not to pay their long distance charges mandates that IXCs use ILEC billing when cost and other considerations make other billing options far more preferable.

Fact: Long distance billing practices are controlled by the unregulated practices and policies of the ILEC billing contracts.

Fact: The IXC's full name & address does not appear on the customer's bill because current practice is for the ILEC's billing agent's name to appear on the bill.

Fact: It is not the choice of the IXC that this billing format is used.

Fact: IXCs are convinced that, but for ILEC billing, they would not collect a viable percentage of their charges.

Fact: This dependence is recognized in the terms and conditions of the billing contracts between the ILECs and their billing agents and, in turn, in the contracts between the ILEC billing agents and their IXC "customers."

Fact: This dependence erases any visage of any equal bargaining position among the parties resulting in the following scenarios contributing to the current public and official dissatisfaction with billing practices.

> * Bills list the billing agent more prominently than the IXC providing the service, misleading the end user to call the billing agent with any question or complaint rather than the IXC.
>
> * When end users call the billing agent rather than the IXC, they often receive the response of a "hireling," that is, an entity with the least motive to provide customer satisfaction.

* Billing agents providing user unfriendly responses incent users to escalate their inquiries to complaints to official bodies.

* For their part, ILECs, understandably desiring not to be involved and wishing to create a good public relations image, unilaterally provide end users with credits and concessions without justification, increasing IXCs' bad debt ratios and overall operating costs which, in turn, worsens their competitiveness and harms their financial viability.

* The foregoing market negatives are exacerbated by the FCC's and state PUCs' policy that requires notice to end users that their local service cannot be terminated for non-payment of long distance charges. The existence of this official policy (1) diminishes the credibility of the IXC and its charges; (2) encourages consumer fraud and irresponsibility; (3) increases the incidents of consumer complaints based on allegations of slamming or cramming as a ruse to avoid paying IXC charges; and (4) increases IXC bad debt, lowers profitability and increases operating costs, all of which diminishes the IXCs' competitiveness and long-term success.

A related problem is created by the apparent limitations on billing format. ILEC billing arms insist that there is a narrowly circumscribed space on bills to describe an IXC's services and charges. These space limitations are used by ILECs to insist that only a limited number of characters can be included on a monthly bill. This leads to unilateral decisions on abbreviating an IXC's name and foregoing any placement of information on how a consumer may reach the IXC to get satisfaction for its questions, complaints, etc. Much public confusion and generation of unnecessary complaints results.

In addition, ILECs' billing format practices list their respective billing agents before the IXC and provide contact information for consumers only for those billing agents. In consequence, consumers with questions or complaints first call either the billing agent or the ILEC. Problems are created when the billing agent's customer service environment fails to meet fundamental standards of good practices and when the ILEC representatives choose to unilaterally favor the consumer without investigation or notice to the IXC whose services and charges may be in question. Poor customer relations by billing agents may be the exception to the rule, but when they occur, they take the form of: (1) nonresponsiveness to the customer's issue; (2) curt referral of the customer to the IXC, sometimes accompanied by derogatory comments; (3) pass-off of the customer to the IXC or ILEC. When customers receive harsh or uncooperative treatment, they get angry and complain to regulatory authorities. The full brunt of the complaint falls on the IXC which, in many cases, has not even been informed of the problem or, when informed, the souring of customer relations has already occurred.

When referrals are made to the ILEC, or the customer calls the ILEC directly, too often the ILEC representative takes the opportunity to commiserate with the customer and enhance its image of customer concern. Often, the ILEC representatives will simply credit the customer on the spot without any contact with the IXC or any confirmation of the legitimacy of the customer's complaint. Small carriers are most often the victims of these on-the-spot credit decisions.

When either the consumer calls the ILEC billing agent and receives a cold reception prompting complaint to authorities, while the IXC being complained of has no idea of the problem or that one even exists; or the consumer calls the ILEC to complain and receives a total credit against all IXC charges, the IXC, totally devoid of any inkling of the existence of a complaint and unable, therefore, to undertake investigation to formulate a proper resolution, is deprived of its charges properly billed.

III. REGULATORY CONTROL OF THE CONTENT OF BILLING RAISES FIRST AMENDMENT ISSUES.

GTC believes it would be extremely unwise for the Commission to attempt to exercise editorial control over billing content. On the other hand, editorial decisions regarding the content and nature of the line item descriptions of IXC charges and services is already subjected to private censorship by ILECs. This "censorship" is affected by unilaterally refusing to accept IXC descriptions of ancillary services. It also has taken the form of treating government mandated assessments as "ancillary services" and using such categorization as a basis to accuse IXCs of "cramming." This cramming accusation has then been used as a basis to threaten discontinuance of billing services.

The ILECs which engage in such practices effect their application to "offending" IXCs through their billing agents. Acting as mere messengers, ILEC billing agents simply pass along the ILEC's determination to cease billing or not to bill certain charges because of the ILEC's objection to the description of the charges. In turn, this requires the IXC to accept ILEC versions of such descriptions. This exercise often goes so far as demanding prior editorial oversight of IXC non-usage charges.

Instances of such content control over billing by dominant ILECs arises from the FCC's 1986 decision permitting ILECs to exercise unrestricted and unreviewable editorial power over bills. More recently, the ILECs have sought sanction for their control of billing practices of IXCs by assuming the authority to "police" alleged cases of cramming. See, NPRM at ¶ 9.

GTC submits that it is obvious that such content control, if exercised by the FCC, would raise issues of unwarranted and unconstitutional infringement of the First and Fifth Amendment rights of IXCs. The fact that such power is exercised by ILECs is really a distinction without difference. In the NPRM, not only does the Commission propose nothing to limit a LEC's editorial powers over another's billing, but some Commission proposals would have the effect of expanding these powers by asking LECs to use their control over billing proactively and with greater frequency.

The effect of such unfettered editorial discretion being placed in the hands of a public utility is to afford LECs the ability to suppress speech without giving IXCs the opportunity to contest the propriety of such action prior to the termination of its expression. The impact of billing and collection deregulation has been that the Commission's policy initiative to foster competition through deregulation has, in fact, created the environment for anticompetitive practices and the infringement of free speech. None of the Commission's proposals in the NPRM recognize, much less address or attempt to remedy, this serious state of affairs.

In *Freedman v. Maryland*, 380 U.S. 51, 58 (1965), the Supreme Court set forth a four-part procedural safeguard that must be met before speech is suppressed. Freedman involved the suppression of an adult film that had not been submitted to a censorship board. In that case, the Court held that such prior submission was lawful only if it met the following guidelines:

(1) the burden of proving that the speech is unprotected must rest on the censor;
(2) no final restraint may be imposed without judicial review, and any restraint in advance of judicial review must be limited to the shortest fixed period compatible with sound judicial resolution;
(3) the censor must bear the burden of going to court to suppress speech; and
(4) the procedure must assure a prompt, final judicial decision.

380 U.S. at 58. Under the current system of deregulated billing and collection, ILECs have the power to restrict expression, which may be protected by the First Amendment, but there is no judicial or other review, and no limitations on the scope or timeframe of the restriction.

Absent the imposition of safeguards contained in Sections 201 and 202, or some other form of independent standard for review of today's billing practices, IXC rights to freely market and promote their services will continue to be controlled by ILECs and their billing agents which can be deliberately or inadvertently damaging to the IXCs and their competitiveness. It is GTC's position that the absence of pre-termination review procedures, either by the FCC or an independent industry reviewer, can result in impermissible curtailment of expression protected by the First Amendment in conflict with tests laid down in *Freedman*. In addition, GTC believes that forging ahead with the temporary fixes proposed in the NPRM, without first addressing the underlying causes of the billing problems faced today, may afford ILECs an avenue for suppressing views with which they disagree in order to gain an unfair competitive advantage over their rivals.

IV. JUDICIOUS APPLICATION OF THE UNDERLYING PRINCIPLES OF SECTIONS 201, 202 AND 203 OF THE COMMUNICATIONS ACT CAN HAVE A SALUTARY EFFECT.

The NPRM raises a myriad of issues regarding customer confusion over their telecommunications bills. It also offers several proposals that are geared toward resolving, or at least alleviating, some of this confusion. The Commission seeks comment on the extent of its jurisdiction to address the problems and enforce the proposals identified in the NPRM.

The Commission recognizes that it has Title II jurisdiction over billing and collection provided by common carriers when such services are provided to their own end users.[3] The Commission also recognizes that, although it presently forbears from exercising ancillary jurisdiction over the provision of common carrier billing and collection services performed on behalf of unaffiliated carriers, such third party billing services could be regulated pursuant to Title I of the Act.[4] In his separate statement, Commissioner Furchtgott-Roth expressed reservations regarding the

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3 *Id.* at ¶ 12. See *Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 7 FCC Rcd 3528; 3530-3533 (1992), clarified on reconsideration, 12 FCC Rcd 1632, 1643-1545 (1997) ("*Calling Cards*").

4 *Id. Calling Cards*, op. sit., supra n. 2.

extent of the Commission's authority over the commercial relationship between carriers and their customers and sought comment on the limits of the FCC's authority in this area.[5]

GTC agrees with the Commission's jurisdictional findings and, at the same time, understands Commissioner Furchtgott-Roth's concerns. Ultimately, however, GTC is concerned that both are attempting to walk a jurisdictional tightrope when, in fact, the authority the FCC needs to cure the root cause of customer confusion is available. As discussed above, the sources of much of today's customer confusion can be traced to current dominant billing entities. As earlier discussed herein, these practices developed after the FCC issued its 1986 Detariffing Order. GTC urges the Commission to reconsider its decision in the 1986 Detariffing Order and subsequent orders on FCC forbearance from regulating billing and collection. The Commission should revisit the scope of its present forbearance and, where necessary to address today's problems, tailor the exercise of its authority under either Title II or Title I, and Sections 201, 202 and 203 of the Act to correct deficiencies in the provisioning of billing services by dominant or controlling entities. Not only will judicious reliance on these fundamental powers further the Commission's goal of achieving truthfulness in billing, it will also protect against unfair and anticompetitive billing practices that are certain to increase and become more troublesome in the developing competitive environment created by the Telecommunications Act of 1996.

Included in its analysis, the Commission should consider alternatives to direct involvement, such as exploring the efficacy of industry oversight. Supporting or sponsoring independent industry oversight is a non-regulatory method of ensuring that the principles of Sections 201 and 202 are

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[5] Separate Statement of Commissioner Harold Furchtgott-Roth.

complied with by billing entities in some meaningful way. One thing is for certain, the Commission cannot simply continue to defer to interested industry participants on this issue. To do so would be to place control over an essential aspect of the delivery of telecommunications services of one set of interested parties into the hands of other interested parties. Needless to say, when some of those interested parties are or will compete with entities, particularly small entities, that rely on them for billing and collection services, present competitive imbalances will only worsen.

A. Jurisdiction over Billing and Collection is Proper Under Either Title I or Title II

In the 1986 Detariffing Order, the FCC concluded that billing and collection services performed by a LEC on behalf of a long distance company was not a "communication service," but was instead a "financial and administrative service" and would, therefore, not regulate billing and collection services under Title II of the Communications Act.[6]

In a series of decisions that followed, the Commission first softened and ultimately abandoned the conclusion drawn in the 1986 Detariffing Order. In the 1989 decision, *In the Matter of Public Service Commission of Maryland,* the Commission concluded that, besides "affecting" interstate communications, the billing and collection service that [a LEC] provides for [an IXC] are also "closely related to the provision of [such] services," since billing and collection must occur accurately and efficiently for an interstate carrier to offer its services on an economically sound basis.[7] In a 1992 decision, the Commission definitively announced that LEC billing and collection

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6 *Id.* at 1168

7 See *In the Matter of Public Service Commission of Maryland*, 4 FCC Rcd 4000 (1989) (1989 FCC Decision).

services were subject to Title I jurisdiction.[8] In both decisions, the Commission was discussing its ancillary jurisdiction. However, the same logic the Commission used in both proceedings to conclude that LEC third party billing services are subject to Title I jurisdiction applies equally to Title II. An essential aspect of billing is controlled by common carriers, *i.e.*, the compilation and generation of an individual end user's call detail. Without call detail records provided by common carriers, billing clearinghouses could not exist. Ultimately, although the Commission may call the market for billing competitive, LEC billing retains important aspects of a common carrier service subject to Title II regulation.

B. Deregulation Has Not Provided Its Usual Benefits

The world has changed since 1986 and the intervening years have demonstrated that the benefits of deregulation are not automatic or guaranteed in all circumstances. GTC submits that, at least in part, that is the case here. GTC does not believe that any change is required for independent billing entities which have no means by which to control or dominate any segment of the market for billing services. On the other hand, as GTC has attempted to point out in these comments, there is an identifiable market segment that has not been affected by the general advance in competitive

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[8] *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, 7 FCC Rcd 3528 (1992) (1992 FCC Decision) "We recognize that in the Billing and Collection Detariffing Order, the Commission found that LEC billing and collection for an unaffiliated IXC is 'not a communications service for purposes of Title II of the Communications Act,' but rather, 'is a financial and administrative service.' Nevertheless, in recognizing its Title I ancillary jurisdiction over billing and collection services, the Commission found that such services were 'incidental' to the transmission of wire communications and thus fell within the meaning of 'wire communication' as defined in Section 3(a) of the Act. These two findings appear inconsistent. Upon further analysis, we believe that the latter conclusion, that billing and collection is incidental to the transmission of wire communication and thus is properly considered a communications service under Section 3(a) of the Act, is the correct one . . . .

billing services. It is this area where the Commission should examine the possibilities of exercising its authority to ensure reasonableness of rates, terms and conditions of Billing and Collection contracts, nondiscriminatory practices and to have available Billing and Collection contracts made available for review when issues arise.

Although GTC has demonstrated that the Commission has the authority to re-regulate billing, it does not believe that re-regulation is the only solution. GTC simply supports the exercise of some oversight of billing practices. GTC encourages the Commission to investigate methods of bringing billing back under the protective umbrella of Sections 201 and 202 without necessarily mandating tariffing.

For instance, rather than universally reinstating the tariff requirements of Section 203, GTC suggests that tariffing be limited to situations where there is no option for alternative billing services. Alternatively, GTC suggests a requirement that billing contracts be filed with the FCC. Thus, in the event a billing dispute arises or if a carrier customer finds a term or condition to be unreasonable, unfair or discriminatory, there is some method of reviewing the provision and mediating a resolution.

V. CURRENT POLICY EXCUSING NONPAYMENT OF CERTAIN CHARGES CREATES A DIRECT CONFLICT WITH FUNDAMENTAL CARRIER RIGHTS AND DUTIES UNDER THE LAW

GTC understands the Commission's concerns that customers may be confused about the risk of losing local phone service for failure to pay disputable long distance charges.[9] However, the Commission's proposal to require carriers to differentiate between "deniable" and "non-deniable"

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9 NPRM at ¶ 24.

charges on telecommunications bills[10] encourages customers to withhold payment for legitimately incurred charges and is patently inconsistent with the law. Moreover, requiring carriers or billing companies to segregate IXC charges and identify them as charges that, if disputed, do not have to be paid only encourages frivolous disputes and widespread consumer fraud.

This policy unwittingly upsets the careful balance Congress created between carrier and customer under Title II of the Act. The need for such balancing of rights has most often been posited in the context of a carrier's unfettered right to institute tariff changes subject to the powers of the Commission to suspend and investigate upon proper petition therefor.[11] By effectively encouraging customers not to pay lawfully tariffed charges, the FCC risks nullifying the most basic right of a carrier (indeed, a duty) to collect its charges for services rendered. On the other hand, this policy unduly favors customers by suspending their duty to abide by the terms and conditions of a carrier's filed tariff. The Commission has no jurisdiction to write out of the Act the careful balance of these competing rights for which Congress long ago provided.

Additionally, the current policy overlooks equally clear and important principles of settled law and Commission practice. Carrier customers are required to pay in full all charges incurred pursuant to lawfully filed tariffs irrespective of any claims which may be asserted as to the lawfulness of those charges. The policy of encouraging customers to refuse to pay lawful charges

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[10] *Id.*

[11] *See AT&T v. FCC*, 487 F.2d 865, 873 (2d Cir. 1973) (Describing the rate filing provisions of Section 204 of the Communications Act as a statutory "accommodation" between the rights of carriers and customers) (*citing United States v. Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669, 697 (1973))

by raising a dispute against the carrier is patently at odds with the doctrine adopted in *Mocatta Metals.*[12]

VI. FIRST AMENDMENT ISSUES ARE IMPLICATED BY MANDATING EITHER THE FORM OR CONTENT OF CUSTOMER BILLS

The Commission seeks comment on proposals aimed at adding clarity to line item charges. As earlier discussed, this area implicates grave First Amendment concerns. One such proposal is for the Commission to prescribe "safe harbor" language that carriers, or some subset of carriers, should use to ensure that they provide truthful and accurate information to subscribers with respect to recovery of universal service, access, and similar charges.[13] Another would require carriers to provide consumers with "full and non-misleading" descriptions of all charges contained in their telephone bills.[14] The Commission appears cognizant of the First Amendment implications of these proposals, but nevertheless seeks comment.

A carrier's description of the services, rates and charges that appear on a customer's telecommunications bill is an expression of commercial speech and a form of advertising. The language a carrier uses to describe its services, rates and charges is clearly protected by the First Amendment.[15]

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[12] *In the Matter of Mocatta Metals Corp. v. ITT World Communicatinos, Inc.*, 54 FCC 2d 104 (May 5, 1975).

[13] NPRM at ¶ 27.

[14] NPRM at ¶ 20.

[15] *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* Inc., 425 U.S. 748 (1976); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (Holding that truthful and legitimate commercial speech is protected by the First Amendment).

In *44 Liquormart v. Rhode Island*, 514 U.S. 1095 (1995), the Supreme Court struck down Rhode Island's attempt to ban truthful and non-misleading price advertising related to the sale of alcoholic beverages out of its concerns that such advertising promoted the consumption of alcohol. Similarly, although the Commission has legitimate concerns relating to customers' telecommunications bills, to the extent a carrier's service, rate and charge descriptions are not deceptive or misleading, the Commission is prohibited from either banning particular descriptions or mandating form or content.

The Commission's authority to regulate untruthful and misleading descriptions must be balanced against and considered in the context of the filed tariff doctrine recently reaffirmed in its broadest application by the United States Supreme Court. *AT&T v. Central Office Telephone, Inc.*, 118 S. Ct. 1956 (1998). By law, service descriptions which are consistent with the carrier's filed tariffs, cannot be deceptive, misleading or fraudulent. As such, the Commission may not mandate changes in the ways carriers advertise or describe in their billing their services to the public. To do otherwise creates a clear conflict with a carrier's rights under, and the law's concerns for, the inviolability of the filed tariff doctrine.

VII. THE COMMISSION NEED ONLY ENSURE THAT CHARGES BILLED ARE CONSISTENT WITH FILED TARIFFS

One of the primary reasons the Commission initiated this proceeding is its concern that telecommunications services customers are being misled by the service descriptions that appear on their bills and, as a result, are possibly being over-billed. GTC disagrees with the Commission's proposed solutions to this problem because the FCC's proposals are merely a window treatment and do not address the root cause. In GTC's view, the only mechanism needed to ensure that customers are given adequate service descriptions and charged accurately for those services is strict adherence to the filed-tariff doctrine.

Telecommunication providers are required by law to charge their customers the specific amount designated in their tariff for services. 47 U.S.C. § 203(c); *MCI v. Best Telephone Co., Inc.*, 898 F. Supp. 868 (S.D. Fla. 1994). This requirement of the filed tariff doctrine furthers the policy of non-discrimination so central to the regulatory framework crafted by the Communications Act. Under the filed tariff doctrine, a regulated carrier must charge the tariff rate established with the regulatory agency, even if it has quoted a lower rate to its customer. To do otherwise would give a preference to, and discriminate in favor of, one customer over another. *Marco Supply Co. v. American Tel. & Tel. Communications, Inc.*, 875 F.2d 434, 436 (4th Cir. 1989).

Although it is most commonly referred to in relation to rates, the filed tariff doctrine applies with equal force to the classification and description of services carriers use for billing purposes. In *AT&T v. Central Office Telephone, Inc.*, 118 S. Ct. 1956 (1998), the Supreme Court rejected any notion that the filed tariff doctrine applies exclusively to rates:

> Rates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa . . . [t]he Communications Act recognizes this when it requires the filed tariff to show not only "charges," but also "the classifications, practices, and regulations affecting such charges . . ."

118 S. Ct. 1956. Because the filed tariff doctrine applies equally to "classifications," which are essentially service descriptions, end users are charged with constructive notice of a carrier's service classifications because they, like the rates, are tariffed. Fore-knowledge of the services contained in a carrier's tariff precludes fraud and this is so whether such fore-knowledge is acquired by actual notice or by constructive notice. Where there is knowledge, there can be no fraud. Even where one

may in fact be innocently duped, the filed tariff doctrine simply applies the age old principle of *caveat emptor*. The negligence of the individual in failing to better inform himself is of no moment to the law because of the necessity of the law to protect broader public-as-a-whole interests.

When the filed tariff doctrine applies, there is no cause of action for fraud cognizable before the Commission or before the courts. To allow such a cause of action would undercut the entire framework of the Communications Act. Customers are presumed to know the tariffed rates. There can be no fraudulent intent on the part of the carrier given the presumed knowledge of the customer. To allow a cause of action for fraud would be to introduce the seeds of pricing discrimination that the Communications Act has strived so hard to prevent.

Even outside the ambit of the filed tariff doctrine, courts have been reluctant to give consumers much counsel in regard to perceived misrepresentations by carriers. In *Alicke v. MCI Communications Corporation*, 111 F.3d 909 (D.C. Cir. 1997), a customer brought suit against MCI for its practice of rounding up calls to the next full-minute. The customer did not challenge the reasonableness of the practice or that it was fully disclosed in MCI's tariffs; rather the customer alleged that the practice of billing in full-minute increments without disclosing its rounding-up policy was misleading.

MCI did raise the filed tariff doctrine as pre-empting said claim, but the court did not even have to address the filed tariff doctrine issue. The court held that:

> Alicke has failed to state a claim for any of these causes of action because there is nothing in the way MCI reports the length of long-distance phone calls that could mislead a customer into thinking that she received more service than she really did receive and thereby cause her to use more of MCI's service than she otherwise would have or to refrain from switching to another carrier that bills for service in smaller increments.

Id. at 912. The court further observed:

> [b]ecause no reasonable customer could actually believe that each and every phone call she made terminated at the end of a full minute, the customer must be aware that MCI charges in full-minute increments only. Accordingly, MCI's billing practices could not mislead a reasonable consumer.

Id. Thus, there is a reasonable person standard for misrepresentations. The consumer must show not that he/she was misled, but that a reasonable person would be misled.

VIII. REGULATORY FLEXIBILITY ACT

As part of the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996), Congress enacted the Small Business Regulatory Enforcement Act of 1996. This Act amended the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 ("RFA"), to require agencies to make preliminary and then final "regulatory flexibility analyses"on whether an agency's rules have a significant economic impact on a substantial amount of small entities which includes, *inter alia*, small businesses. 5 U.S.C. §§ 601-612; Funk, *More Stealth Regulatory Reform*, Administrative & Regulatory Law News 1-2 (Summer 1996).[16]

As GTC has shown, in pursuing the quest for more "truth in billing," the Commission will be best served by studying the root causes for some of the more common problems of billing practices. As GTC has also demonstrated, many of the root causes affect small businesses, specifically, small carriers, unable to bargain effectively or freely manage and control the billing of their services. The dilemma created then falls quite heavily on small carriers.

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[16] Under the original version of the RFA, agency determinations and analyses under the Act were exempted from judicial review. As a result of this exemption, both agencies and courts widely ignored the Act. *See, generally, Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985) and its progeny.

The lifeblood of small carriers, like any business, is the ability to properly and timely bill and collect the revenues generated by products and services they render. Any policies or regulations affecting this all important area must be weighed in accordance with the Regulatory Flexibility Act against their impact on small carriers/businesses.

Under the 1996 amendment, agency compliance with the RFA's requirements was made fully subject to judicial review under the Administrative Procedure Act. In addition to remanding the rule to the agency -- a court can also defer enforcement of the rule against small entities "unless the court finds that continued enforcement of the rule is in the public interest." 5 U.S.C. § 611(a)(4)(b); Funk, *More Stealth Regulatory Reform*, Administrative & Regulatory Law News 1-2 (Summer 1996).

In *Thompson v. Clark*, 741 F.2d 401 (1984), this Court was called upon to apply the earlier version of the RFA and held:

> Thus, if data in the regulatory flexibility analysis -- or data anywhere else in the record -- demonstrates that the rule constitutes such an ***unreasonable assessment of social costs and benefits as to be arbitrary and capricious***, 5 U.S.C. § 706(2)(A), the rule cannot stand.

Id. at 405. (emphasis added) The D.C. Circuit added:

> ***if a defective regulatory flexibility analysis caused an agency to underestimate the harm inflicted upon small business to such a degree that, when adjustment is made for the error that harm clearly outweighs the claimed benefits of the rule, then the rule must be set aside.***

Id. (emphasis added).

Thus, there is a firm congressionally-issued and judicially-mandated duty for agencies to take into account the effect of its rules on small entities. Agencies are also called upon to review all *pre-existing* rules to determine their effects on small entities and whether to modify those rules to minimize adverse effects on small entities. *See* Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, § 244, 110 Stat. at 867-68 (to be codified at 5 U.S.C. § 609).

Thus, this Commission must consider the effect of not only its proposed rule, but also the effects of its past policies, on small carriers. Small carriers are being detrimentally impacted by the present billing and collection rules and their financial viability is impacted as a result. The lack of alternatives for billing certain market segments coupled with the disproportionate bargaining power enjoyed by ILECs and their billing agents vis-a-vis small IXCs in the context of a deregulated approach by this Commission severely impedes the interests of small carriers. The Commission should take this opportunity to rectify this unjust imbalance.

CONCLUSION

GTC will carefully examine the comments of other parties in this proceeding. Its intent will be to present more substantive proposals in its reply comments.

Respectfully submitted,

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